Omni Innovations LLC et al v. Smartbargains.com LP et al Doc. 21

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

OMNI INNOVATIONS, LLC, a Washington limited liability company; and JAMES S. GORDON JR. Plaintiffs, v. SMARTBARGAINS.COM, LP, a Delaware Limited Partnership; Defendant.	NO. CV06-1129JCC **SMARTBARGAINS.COM, LP'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED PURSUANT TO FED. R. CIV. P. 12(b)(6)** NOTE ON MOTION CALENDAR: October 5, 2007

I. INTRODUCTION

Plaintiffs Omni Innovations, LLC ("Omni") and James S. Gordon, Jr. ("Gordon") (together, "Plaintiffs") assert claims against defendant SmartBargains.com, LP ("SmartBargains") for alleged violations of the federal CAN-SPAM Act, 15 U.S.C. § 7701 *et seq*. ("CAN-SPAM"); the Washington Commercial Electronic Mail Act, RCW 19.190 *et seq*., ("CEMA"); and the Washington Consumer Protection Act, RCW 19.86 ("CPA"). This Court recently dismissed identical claims by these same Plaintiffs against Virtumundo, Inc. and Adknowledge, Inc. in Gordon et al. v. Virtumundo et al., Case No. CV06-0204-JCC, W.D.Wash. (Coughenour, J.) ("Virtumundo"). In Virtumundo, this Court held that: 1) Plaintiffs lack standing to assert CAN-SPAM claims; 2) Plaintiffs'

NEWMAN & NEWMAN, ATTORNEYS AT LAW, LLP
505 Fifth Ave. S., Ste. 610
Seattle, Washington 98104
(206) 274-2800

Dockets.Justia.com

CEMA claims are preempted by CAN-SPAM, and 3) Plaintiffs' CPA claims fail because they are based on Plaintiffs' CEMA claims. As such, Plaintiffs' claims have been fully litigated, and Plaintiff has lost. The doctrine of collateral estoppel bars Plaintiffs from relitigating identical claims in this action.

Now that the court has disposed of Plaintiffs' claims as a matter of law in Virtumundo, it should dismiss Plaintiff's identical claims against SmartBargains. In an April 17, 2007 order (the "Order", Dkt. #17), the Court stayed this case pending resolution of Virtumundo, and further provided that "Defendant's [previously filed] motion to dismiss Plaintiff's claims [Dkt. #13] is DENIED WITHOUT PREJUDICE to refiling after the stay has been lifted." (Order at 1:20-22.) Virtumundo is now resolved, and the Court has presumptively lifted the stay it previously granted in this case. (*See* Minutes of Status Conference, Dkt. #20.) Since the stay has been lifted, the Court should dismiss Plaintiffs' claims.

Not only are Plaintiffs barred from pursuing their claims due to collateral estoppel, but Plaintiffs also fail to allege their claimed statutory violations are material. Both the Virtumundo court and the highest Washington court to consider the issue held that a plaintiff must prove a material violation to succeed on its claims. Plaintiffs never specifically plead a material violation. Their complaint fails to meet even the minimal standard for notice pleading. Plaintiffs merely parrot the elements of CAN-SPAM and follow that litany with a conclusory sentence stating that SmartBargains violated the statute. As the Supreme Court recently confirmed, these allegations are not enough to provide SmartBargains a fair opportunity to respond to the allegations in this lawsuit. Accordingly, the Court should dismiss this action.

II. FACTS

A. The plaintiffs and their claims are the same here as in Virtumundo.

Plaintiffs in the instant action - James S. Gordon, Jr., a Washington resident, and Omni Innovations, LLC, a Washington limited liability company - were also the plaintiffs

NEWMAN & NEWMAN,
ATTORNEYS AT LAW, LLP
505 Fifth Ave. S., Ste. 610
Seattle, Washington 98104
(206) 274-2800

in Virtumundo. (*See* Virtumundo, First Amended Complaint (Dkt. #15) ¶¶ 3.2, 3.3 ("FAC"); Complaint (Dkt. #1) ¶¶ 1, 2.)

Plaintiffs are in the business of filing lawsuits under 15 U.S.C. § 7705 *et seq*. ("CAN-SPAM") and the Washington Commercial Electronic Mail Act, RCW 19.190 et seq. ("CEMA") (Virtumundo, Order (Dkt. #121) at 2:16-17) (the "Virtumundo Order"). Plaintiffs have filed many[1] such suits, and Gordon testified in Virtumundo that these lawsuits are their sole source of income. (Virtumundo, Gordon Deposition Transcript, attached as Exhibit A to the Declaration of Derek A. Newman (Dkt. #101) at 118:2-6.) In Virtumundo, as in most of their lawsuits, Plaintiffs asserted violations of CAN-SPAM; CEMA, and CPA. (*See* Virtumundo, FAC ¶ ¶ 4.1, 4.2.) In this action, Plaintiffs assert the same causes of action. (*See* First Amended Complaint (Dkt. #4) ¶¶ 18-21.)

B. Plaintiffs' CAN-SPAM claims are the same.

In enacting the CAN-SPAM act, 15 U.S.C.§ 7701 et seq., Congress expressly recognized that commercial email offers "unique opportunities for the development and growth of frictionless commerce." 15 U.S.C. § 7701(a)(1). Anti-spam and consumer groups urged Congress to ban all unsolicited commercial email, and to create a private right of action for liquidated damages. Congress declined, and instead enacted a scheme 1) to create a nationwide standard for commercial email; 2) to prohibit senders of commercial electronic mail from misleading recipients as to the source or content of such mail; and 3) to ensure that recipients of commercial electronic mail have the right to decline additional email from a particular source. 15 U.S.C. § 7701(b). The Act does not create any private cause of action for individual recipients of unsolicited commercial

---

[1] Gordon and Omni are the plaintiffs in at least seven (7) CAN-SPAM lawsuits in this district alone. (Omni Innovations LLC v. Inviva Inc. d/b/a American Life Direct and American Life Insurance Co of New York, C06-1537 C; Omni Innovations LLC v. BMG Music Publishing NA Inc., C06-1350 C; Omni Innovations LLC v. Publishers Clearing House Inc., C06-1348 T; Omni Innovations LLC v. Efinancial LLC et al., C06-01118-MJP; Omni Innovations LLC v. Insurance Only Inc et al., C06-01210-TSZ; Omni Innovations LLC v. Ascentive LLC et al., C06-01284-TSZ; Omni Innovations LLC et al v. Inviva Inc et al., C06-01537-JCC.)

NEWMAN & NEWMAN, ATTORNEYS AT LAW, LLP
505 Fifth Ave. S., Ste. 610
Seattle, Washington 98104
(206) 274-2800

email, even if those emails violate the requirements of the Act. Rather, the Act is enforceable *only* by the Federal Trade Commission and other specified federal agencies, by state Attorneys General; and by "provider(s) of Internet access service" who are "adversely affected by a violation of section 7704 (a)(1), (b), or (d) of [the Act], or a pattern or practice that violates paragraph (2),(3), (4), or (5) of section 7704 (a)." 15 U.S.C. § 7706(g)(1) (emphasis added).

The defendants in Virtumundo moved for summary judgment on all causes of action. (*See* Virtumundo, Dkt. #98.) The defendants argued that Omni and Gordon were not "providers of Internet access service" and in any event had not been "adversely affected" by violations of CAN-SPAM. In its Order dated May 15, 2007 this Court granted defendants' motion and dismissed Plaintiffs' claims finding:

> that Plaintiffs do not have CAN-SPAM standing.
>
> *****
>
> ...even if there is some negligible burden to be inferred from the mere fact that unwanted e-mails have come to Plaintiffs' domain, it is clear to the Court that whatever harm might exist due to that inconvenience, it is not enough to establish the "adverse effect"intended by Congress.
>
> *****
>
> Plaintiffs also admit to *benefitting* from spam by way of their research endeavors and prolific litigation and settlements. This belies any suggestion that Plaintiffs are "bona fide Internet service providers" that have been "adversely affected" by spam. Instead, Plaintiffs' continued use of other people's e-mail addresses to collect spam and their undisputed ability to separate spam from other e-mails for generating lawsuit-fueled revenue directly contradicts any hint of adverse effect that otherwise might exist. Plaintiffs are not the type of entity that Congress intended to possess the limited private right of action it conferred on adversely affected bona fide Internet access service providers.

(Virtumundo Order at 13:15; Id. at 13:23-25; Id. at 15:9-14 (emphasis original).) [2]

In the instant action, Plaintiffs sue under CAN-SPAM as "the providers of Internet access service receiving ...E-mail." (First Amended Complaint (Dkt. #4) ¶ 18).

---

[2] Plaintiffs appealed on June 15, 2007 (Gordon v. Virtumundo, Inc., No. 07-35487 (9th Cir.)).

NEWMAN & NEWMAN, ATTORNEYS AT LAW, LLP
505 Fifth Ave. S., Ste. 610
Seattle, Washington 98104
(206) 274-2800

Significantly, the time period in which the violations of CAN-SPAM are alleged to have occurred is identical to that alleged in Virtumundo. In Virtumundo, Plaintiffs sought damages for acts that allegedly commenced on August 21, 2003 and continued until at least February 15, 2006. (Virtumundo Order at 2:19-3:2.) Here, Plaintiffs seek damages for acts that allegedly occurred "[d]uring the time period of approximately August 2003 through [the present]." (First Amended Complaint (Dkt. #4) at ¶ 11, 17.) The Court ruled in Virtumundo that during this time period Plaintiffs were not "adversely affected" by receiving an email, and thus lacked the standing CAN-SPAM requires.

C. Plaintiffs' CEMA and CPA claims are the same.

In Virtumundo, as here, Plaintiffs asserted claims under Washington's Commercial Electronic Mail Act, RCW 19.190 *et seq*. RCW 19.190.020 prohibits transmitting a commercial email message that "misrepresents or obscures any information in identifying the point of origin or the transmission path" of the message.

Plaintiffs claimed in Virtumundo that the "headers" of defendants' emails were misleading because they "misrepresent[ed] or obscure[ed] . . . information in identifying the point of origin or the transmission path" because the "from name" alone did not identify defendant Virtumundo. (Virtumundo Order at 18:7-9.) Plaintiffs claim in this action that Defendant's emails are misleading because "IP address and host name information do not match, or are missing or false, in the 'from' and 'by' tokens in the Received header field; and dates and times of transmission are deleted or obscured." (First Amended Complaint (Dkt. #4) ¶ 13.) Although these factual allegations may appear dissimilar, they are functionally identical in that neither alleges a *material* misrepresentation, that is, a misrepresentation that would prevent a recipient from readily identifying the sender.

In Virtumundo, Plaintiffs' claims under the CPA were based solely on the alleged violations of CEMA and the acts constituting such alleged violations. (Virtumundo, FAC (Dkt. #15) ¶¶ 4.2.4, 4.2.5.) This Court dismissed Plaintiffs' CPA claims, holding that

NEWMAN & NEWMAN,
ATTORNEYS AT LAW, LLP
505 Fifth Ave. S., Ste. 610
Seattle, Washington 98104
(206) 274-2800

"[b]ecause Plaintiffs' preempted CEMA claims are the basis for their CPA claims, the CPA claims too must fail." (Virtumundo Order at 20:25-21:1.) Here, as in Virtumundo, Plaintiffs' claims under the CPA are based solely on alleged email messages identical to those on which their alleged violations of CEMA are based. (First Amended Complaint, ¶¶ 20-21.)

III. ARGUMENT

A. The Virtumundo decision has preclusive effect in this lawsuit.

As a general rule, courts may not consider materials beyond the pleadings in a ruling on a Rule 12(b)(6) motion. Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). Courts may, however, consider documents referenced extensively in the complaint, documents that form the basis of the claim, and matters of judicial notice when determining if a plaintiff has stated a claim upon which relief may be granted. United States v. Ritchie, 342 F.3d 903, 908–09 (9th Cir. 2003). The Court need only take judicial notice of its own record in Virtumundo to establish that the issues in the instant action have already been litigated by Gordon and Omni, who lost. Re-litigation of these same issues is barred by the doctrine of collateral estoppel.

"Collateral estoppel" or "offensive nonmutual issue preclusion" generally prevents a party from relitigating an issue that the party has litigated and lost. *See* Catholic Social Servs., Inc. v. I.N.S., 232 F.3d 1139, 1152 (9th Cir. 2000). In the interest of efficient and expeditious judicial administration, res judicata and as a corollary, collateral estoppel, can be raised and considered by a Rule 12(b) motion to dismiss. Pyles v Keane, 418 F Supp 269 (S.D.N.Y. 1976).

The application of "offensive nonmutual issue preclusion" is appropriate if:

1. there was a full and fair opportunity to litigate the identical issue in the prior action, *see* Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1399 (9th Cir. 1992); Resolution Trust Corp. v. Keating, 186 F.3d 1110, 1114 (9th Cir. 1999); Appling v. State Farm Mut. Auto Ins. Co., 340 F.3d 769, 775 (9th Cir. 2003);

NEWMAN & NEWMAN,
ATTORNEYS AT LAW, LLP
505 Fifth Ave. S., Ste. 610
Seattle, Washington 98104
(206) 274-2800

2. the issue was actually litigated in the prior action, *see* Appling, 340 F.3d at 775;

3. the issue was decided in a final judgment, *see* Resolution Trust Corp., 186 F.3d at 1114; and

4. the party against whom issue preclusion is asserted was a party or in privity with a party to the prior action, *see* id.

See also Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 (9th Cir. 2006); Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir. 1988). Each of Plaintiffs' claims in this action satisfies this standard.

1. Plaintiffs' CAN-SPAM claims are preempted.

Plaintiffs' CAN-SPAM claims meet the Ninth Circuit's test for offensive nonmutual issue preclusion. First, Plaintiffs had a full and fair opportunity to litigate the issue of CAN-SPAM standing in Virtumundo. Even a cursory review of the Court's docket in Virtumundo is sufficient to establish this fact; the docket contains 140 entries over fifteen months. As the Virtumundo Order makes clear, the factual record relating to Plaintiffs' alleged Internet access services is extensive. Second, the issues of standing and adverse effect were litigated and were the basis for the Court's ruling. Third, final judgment was entered in favor of Virtumundo and the other defendants. *See* Virtumundo at Dkt. # 122. Finally, Plaintiffs are the identical parties to the Virtumundo action. Consequently, the Court's Order in Virtumundo has a preclusive effect in this lawsuit.[3]

2. Plaintiffs' CEMA and CPA claims are both precluded and preempted.

Congress intended CAN-SPAM to create a single national standard for commercial email, and to that end it preempts state laws, subject to a narrow exception:

> This chapter supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, *except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto.*

[3] Plaintiffs' appeal has no effect regarding issue preclusion. "Under Washington law, it has been long-established that the pendency of an appeal does not affect the preclusive effect of a judgment rendered at the trial level." Martinez v. Universal Underwriters Ins. Co., 819 F. Supp. 921, 922 (W.D.Wash. 1992).

NEWMAN & NEWMAN, ATTORNEYS AT LAW, LLP
505 Fifth Ave. S., Ste. 610
Seattle, Washington 98104
(206) 274-2800

15 U.S.C. 7707(b)(1) (emphasis added). In Omega World Travel, Inc. v. Mummagraphics, Inc., 469 F. 3d 348 (4th Cir. 2006), the Fourth Circuit considered the CAN-SPAM preemption clause in relation to an Oklahoma law that prohibits, among other things, sending a commercial email that "misrepresents any information in identifying the point of origin or the transmission path of the electronic mail message." This is virtually identical to the CEMA provision upon which Plaintiffs base their suit. In analyzing whether the statute was preempted by CAN-SPAM, the Fourth Circuit first noted that the Oklahoma statute prohibits conduct that does not amount to fraud:

> By its terms, the statute is not limited to inaccuracies in transmission information that were material, led to detrimental reliance by the recipient, and were made by a sender who intended that the misstatements be acted upon and either knew them to be inaccurate or was reckless about their truth.

Omega World Travel, Inc., *supra*, 469 F. 3d at 353. The court then turned its attention to the language of CAN-SPAM's preemption clause:

> The exception . . .allows states to prohibit "falsity or deception" in commercial e-mail messages. Those terms are not defined in the statute. However, "deception" requires more than bare error, and while "falsity" can be defined as merely "the character or quality of not conforming to the truth or facts," it also can convey an element of tortiousness or wrongfulness, as in "deceitfulness, untrustworthiness, faithlessness."

Omega World Travel, Inc., *supra*, 469 F.3d at 354. The court then held that "Congress did not intend "falsity" to encompass bare error because such a reading would upset the Act's careful balance between preserving a potentially useful commercial tool and preventing its abuse." Id.

In Virtumundo, this Court adopted the reasoning and holding of Omega World Travel and held that claims under CEMA that pertain to immaterial errors are preempted by CAN-SPAM:

> while claims actually alleging falsity or deception under CEMA would not be preempted, Plaintiffs' claims here—for, at best, "incomplete" or less than comprehensive information—are for immaterial errors that may not be litigated under state law. Plaintiffs have not raised any issues of material fact that could prove Defendants' e-mails materially "false or deceptive" as those terms are used in the CAN-SPAM Act.

NEWMAN & NEWMAN, ATTORNEYS AT LAW, LLP
505 Fifth Ave. S., Ste. 610
Seattle, Washington 98104
(206) 274-2800

(Virtumundo Order at 20:2-7.) Plaintiffs' CEMA claims in this action similarly pertain to incomplete or less than comprehensive information, rather than fraud. Although plaintiffs allege that Defendant's emails include "header information that is materially false or materially misleading," the examples they provide - "IP address and host name information do not match, or are missing or false, in the 'from' and 'by' tokens in the Received header field; and dates and times of transmission are deleted or obscured" - would not prevent ready identification of the sender and are not material. (First Amended Complaint (Dkt. #4) ¶13.) As such, they are preempted by CAN-SPAM.

Moreover, Plaintiffs' factual allegations, such as they are, do not amount to a violation of CEMA. In Benson v. Or. Processing Serv., 2007 Wash. App. LEXIS 31 (Wash. Ct. App. 2007), the Washington Court of Appeals considered the proper application of CEMA, and held that the statute does not impose liability for immaterial errors. In Benson, the defendant sent plaintiff hundreds of unsolicited commercial email messages. Id. at *2. Rather than use the "unsubscribe" links provided in the messages, the plaintiff replied to the email. Id. The reply address was non-functioning, and plaintiff brought suit, alleging that the non-functioning reply address constituted a violation of RCW 19.190.020. Id. The trial court dismissed plaintiff's claims and the Court of Appeals affirmed, holding:

> Because all the e-mail identified one of [defendant]'s domain names and most of them contained an "unsubscribe link" and listed [defendant]'s physical address and telephone number, the e-mail did not misrepresent or obscure any information identifying their points of origin or transmission paths.

Id. at *1. Plaintiffs' factual allegations, which pertain to errors in email headers that most users would not be likely to notice, do not state a violation of CEMA.

Finally, like Plaintiffs' CAN-SPAM claims, Plaintiffs' CEMA claims are precluded by the doctrine of collateral estoppel. Plaintiffs have had a full and fair opportunity to litigate the preemptive scope of CAN-SPAM, and the issue was actually litigated to a final judgment against Omni and Gordon. Accordingly, Plaintiffs' CEMA

NEWMAN & NEWMAN,
ATTORNEYS AT LAW, LLP
505 Fifth Ave. S., Ste. 610
Seattle, Washington 98104
(206) 274-2800

claims are both precluded by the decision in Virtumundo and preempted by CAN-SPAM and cannot now be re-litigated.

Plaintiffs' CPA claims in this action are based on the identical allegations on which their CEMA claims are based. Thus, as Plaintiffs' CEMA claims fall, so do their CPA claims. Because Plaintiffs' CEMA claims are both precluded and preempted, Plaintiffs' CPA claims must also be dismissed. Moreover, Plaintiffs are estopped from asserting their CPA claims. This same issue - the survival of CPA claims in the absence of the CEMA claims which provide their basis - was fully litigated in Virtumundo to a final decision against Gordon and Omni. Plaintiffs' CPA claims must therefore be dismissed.

B. The Complaint should be dismissed for failure to state a claim upon which relief can be granted because Plaintiffs did not allege material violations.

Citing Omega World Travel, Inc., *supra*, 469 F. 3d at 353, the Virtumundo Court held that "immaterial errors . . . may not be litigated under state law". (Virtumundo Order at 20:2-7.) The highest Washington state court to consider the issue concurred. See Benson, *supra*, 2007 Wash. App. LEXIS 31. Consequently, Plaintiffs cannot state a claim without alleging material errors in the emails at issue.

Plaintiffs' complaint fails to specifically allege material errors, and should be dismissed for failure to meet the pleading standards of FED. R. CIV. P. 8(a). Although the bar set by Rule 8 is low, it is a bar nonetheless. As the Supreme Court recently clarified:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, ibid., a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true.

Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007); *see also* Gen-Probe, Inc. v. Amoco Corp., 926 F. Supp. 948, 961 (S.D. Cal. 1996) (providing that, "Even under liberal notice pleading, the plaintiff must provide facts that 'outline or adumbrate' a viable claim for

NEWMAN & NEWMAN,
ATTORNEYS AT LAW, LLP
505 Fifth Ave. S., Ste. 610
Seattle, Washington 98104
(206) 274-2800

relief, not mere boilerplate sketching out the elements of a cause of action."). Judge Lasnik recently held that Fed. R. Civ. P. 8(a) requires that the complaint must give notice of the basic events and circumstances giving rise to plaintiffs' claims to afford defendants a meaningful opportunity to respond. In re Network Commerce Secs. Litig., 2006 U.S. Dist. LEXIS 30945, *15 (W.D.Wash. May 16, 2006) (Lasnik, J.) (concluding that plaintiffs' bald assertions were "so vague that defendants cannot meaningfully respond"); *see also* United States ex rel. Karvelas v Melrose-Wakefield Hosp., 360 F.3d 220 (1st Cir. 2004) cert den 543 U.S. 820 (2004).

Plaintiffs' CAN-SPAM, CEMA and CPA claims are all based on the same factual allegation, which merely parrots the statute:

> Each of the E-mails misrepresents or obscures information in identifying the point of origin or the transmission path thereof, and contain header information that is materially false or materially misleading. These misrepresentations include without limitation: IP address and host name information do not match, or are missing or false, in the "from" and "by" tokens in the Received header field; and dates and times of transmission are deleted or obscured.
>
> On information and belief, Plaintiffs allege that some of the E-mails used the Internet domain name of a third party or third parties without permission of that third party or those third parties.

(First Amended Complaint, ¶¶ 13-14.) Each cause of action then generally alleges that SmartBargains initiated the transmission of emails in violation of the applicable statute and that Plaintiffs suffered damage as a result. Nowhere is it alleged that any particular email violates any particular statute, nor how the emails are fraudulent or deceitful. The complaint does not allege any particular prohibition that SmartBargains violated, or any specific subsection contained in CEMA or CAN-SPAM. Rather, the misrepresentations identified would not prevent a recipient from easily identifying the sender of an email. According to this Court's order in Virtumundo, and Omega World Travel v. Mummagraphics, Inc., 469 F.3d 348, 353 (5th Cir. 2006), these allegations do not rise to the level of material errors surviving preemption because the sender of the email can still be identified by looking at the email.

NEWMAN & NEWMAN,
ATTORNEYS AT LAW, LLP
505 Fifth Ave. S., Ste. 610
Seattle, Washington 98104
(206) 274-2800

Plaintiff's allegations do not meet the pleading standard established by Rule 8. In the Karvelas decision, the First Circuit noted that,

> Even under liberal pleading requirements of Fed. R. Civ. P. 8(a), plaintiff must set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory; simply parroting language of statutory cause of action, without providing some factual support, is not sufficient to state claim.

Id. at 226; *see also* 5 Charles Alan Wright et al., Federal Practice and Procedure § 1216 at 156-59 (1990) (a complaint must contain "either direct allegations on every material point necessary to sustain a recovery on any legal theory . . . or allegations from which an inference may fairly be drawn that evidence on these material points will be introduced at trial"). It is a fundamental matter of due process that a defendant cannot defend himself against allegations that the plaintiff refuses to articulate. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 546 (1985) (providing that the "essential requirements of due process" are "notice and an opportunity to respond."); *see also* State of Cal. ex rel. Lockyer v. FERC, 329 F.3d 700, 710 (9th Cir. 2003) (same).

Plaintiffs have not identified any facts upon which their claims against Defendant are based. The complaint does not allege material violations, but instead asserts trivial and hyper-technical errors about "tokens in the Received header field" and "dates and times of transmission". Unless Plaintiffs allege that the emails do not reveal the senders, Plaintiffs' state law claims must fail. The complaint does not afford SmartBargains a fair opportunity to understand the allegations made against it. Therefore, the Court should dismiss this case.

IV. CONCLUSION

The Virtumundo court held that Plaintiffs lack standing to sue under CAN-SPAM, that Plaintiffs' CEMA claims are preempted by CAN-SPAM, and that Plaintiffs' CPA claims cannot survive the dismissal of Plaintiffs' CEMA claims. The same claims based upon the same facts are at issue in this case. These issues have been litigated and this Court does not need to waste its time and resources to revisit them. Additionally,

NEWMAN & NEWMAN,
ATTORNEYS AT LAW, LLP
505 Fifth Ave. S., Ste. 610
Seattle, Washington 98104
(206) 274-2800

Plaintiffs do not allege material violations of the statutes at issue, which is required to properly state a claim. Accordingly, SmartBargains respectfully requests the Court dismiss this action and all claims alleged herein.

DATED this 13th day of September, 2007.

NEWMAN & NEWMAN, ATTORNEYS AT LAW, LLP

By: ______________________________
Derek A. Newman, No. 26967
derek@newmanlaw.com
Randall Moeller, No. 21094
randy@newmanlaw.com

Attorneys for SmartBargains.com, LP